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In the Supreme Court of the United States

SERGIO MARTINEZ-GUERRERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has the authority under 18 U.S.C. 3584(a) to direct that a federal sentence be served consecutively to a state sentence that may be imposed in future state court proceedings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter, but the judgment is reprinted in 262 Fed. Appx. 664.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2008. The petition for a writ of certiorari was filed on April 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Northern District of Texas on one count of illegally entering the United States after having been previously deported, in violation of 8 U.S.C. 1326. The district court sentenced

him to 24 months of imprisonment and ordered that the federal sentence run consecutively to any state sentence subsequently imposed by the state court in connection with a pending misdemeanor charge in North Carolina. The district court also imposed three years of supervised release. Pet. App. 13a-16a. The court of appeals summarily affirmed. *Id.* at 1a-2a.

1. Petitioner is a citizen of Mexico. In August 2006, he was deported from the United States to Mexico. In January 2007, an immigration agent found him in Tahoka, Texas. Petitioner had not received the consent of the Attorney General or the Secretary of Homeland Security to apply for readmission to the United States. Pet. App. 11a.

Petitioner was indicted on one count of illegally reentering the United States after deportation, in violation of 8 U.S.C. 1326. Pet. App. 7a-8a. Petitioner pleaded guilty to the indictment. *Id.* at 4a.

The Presentence Report (PSR) indicated that petitioner had previously been deported 17 times. It also stated that petitioner had a pending misdemeanor charge in state court in Durham, North Carolina, alleging that in October 2001, he committed a misdemeanor assault on a woman. PSR paras. 28, 56.

At the initial sentencing, the district court imposed a sentence of 42 months of imprisonment and ordered it "to run consecutive with" any sentence imposed in the pending state misdemeanor charge. 7/20/07 Sent. Tr. 4. In imposing that sentence, the court noted that petitioner had previously been deported 17 times. It also observed that petitioner had been arrested for driving while impaired, but that there was no final adjudication in that case because he had failed to appear. The court explained that the 42-month sentence, an upward vari-

ance from the advisory Sentencing Guidelines range of zero to six months of imprisonment, was justified in order to reflect the seriousness of petitioner's offense in light of his "history," including his conduct demonstrating a lack of respect "for the laws of the United States or the borders of this country." The court also based the sentence on affording adequate deterrence and protecting the public "from this individual who is intent on reentering the United States unlawfully out of total and complete disregard of the laws of this country." *Id.* at 5-6.

Petitioner objected to the "imposition of time consecutive to an, as yet, unimposed sentence." 7/20/07 Sent. Tr. 6. The district court rejected the objection on the ground that Fifth Circuit precedent permits the imposition of consecutive sentences. *Id.* at 7.

Upon petitioner's motion, the court subsequently amended its sentence to a term of 24 months of imprisonment to conform to an applicable statutory maximum. The court likewise imposed that term to run consecutively to any sentence imposed in the state case. Pet. App. 14a-15a.

2. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-2a. The court rejected petitioner's argument that the district court lacked authority to direct that his sentence be served consecutively to an as-yet-unimposed state sentence. *Ibid.* The court held that petitioner's argument was foreclosed by its decision in *United States* v. *Brown*, 920 F.2d 1212 (5th Cir.), cert. denied, 500 U.S. 925 (1991), abrogated on other grounds by *United States* v. *Candia*, 454 F.3d 468, 472-473 (5th Cir. 2006). Pet. App. 1a-2a.

3. According to the Bureau of Prisons, petitioner's anticipated release date is October 22, 2008.

ARGUMENT

Petitioner renews his claim (Pet. 7-14) that the district court did not have the authority to direct that his sentence run consecutively to a state sentence that had not yet been imposed. Petitioner is correct in pointing out (Pet. 5-7) that the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively to a yet-to-be-imposed state sentence. In addition to the Fifth Circuit, the courts of appeals for the Eighth, Tenth, and Eleventh Circuits have held that district courts have such authority. See *United States* v. *Andrews*, 330 F.3d 1305, 1306-1307 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Mayotte*, 249 F.3d 797, 798-799 (8th Cir. 2001) (per curiam); *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995). The courts of appeals for the Second, Sixth, Seventh, and Ninth Circuits have held that district courts lack that authority. *United States* v. *Donoso*, 521 F.3d 144, 146-149 (2d Cir. 2008) (per curiam); *Romandine* v. *United States*, 206 F.3d 731, 737-738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1040 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (9th Cir. 1991); see also *United States* v. *Smith*, 472 F.3d 222, 225-227 (4th Cir. 2006) (holding that court lacks authority to impose a federal sentence consecutive to an as-yet-unimposed federal sentence).[1]

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[1] Notably, while the Seventh Circuit concluded in *Romandine* that a district court cannot "*declare* that his sentence must run consecutively to some sentence that may be imposed in the future," that is nonetheless the consequence, "by force of law," of the last sentence of 18 U.S.C. 3584(a). 206 F.3d at 737-738. The court explained that the last sentence of Section 3584(a) establishes a default rule of consecutive sentences

Resolving that conflict is unnecessary, however, and further review is not warranted. The Court has recently denied review of the same issue presented by petitioner in numerous cases. See *Lopez* v. *United States*, 128 S. Ct. 705 (2007) (No. 07-5060); *King* v. *United States*, 128 S. Ct. 706 (2007) (No. 07-5307); *Cox* v. *United States*, 547 U.S. 1127 (2006) (No. 05-454); *Lackey* v. *United States*, 545 U.S. 1142 (2005) (No. 04-9286); *Martinez* v. *United States*, 543 U.S. 1155 (2005) (No. 04-7129); and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136). There is no reason for a different result here. Indeed, because petitioner will complete service of his federal sentence on October 22, 2008, and has not even been formally charged in the anticipated state case, a decision on the question presented will almost certainly have no practical impact on petitioner.[2]

"covering all situations not otherwise provided for," including where the federal sentence precedes the state sentence. *Id.* at 738. Under the Seventh Circuit's analysis, although the district court would not have had the power affirmatively to declare that its sentence was to run consecutively to a yet-to-be-imposed state sentence, the same result could have been achieved simply by not ordering that the sentences be served concurrently. The Tenth Circuit also construed the last sentence of Section 3584(a) to apply to a federal sentence imposed before a state sentence. See *Williams*, 46 F.3d at 59. The Second and Sixth Circuits take a different position, stating that the final sentence of Section 3584(a) applies only if the defendant is already subject to a state sentence at the time of the federal sentencing. *Donoso*, 521 F.3d at 149; *Quintero*, 157 F.3d at 1039-1040; see also *Smith*, 472 F.3d at 226-227. The Fifth Circuit did not address the meaning of the final sentence of Section 3584 in this case, nor in the opinion on which it relied. See *Brown*, 920 F.2d at 1216-1217.

[2] There is also no reason to hold this case for *Oregon* v. *Ice*, cert. granted, No. 07-901 (Mar. 17, 2008), which presents the question whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296

1. Resolving whether district courts have the power to impose a sentence that is to run consecutively to a yet-unimposed state sentence is unnecessary, because the adoption of one legal rule or the other has little if any practical effect. The courts of appeals that have held that district courts have authority under Section 3584(a) to provide that a federal sentence runs consecutively to a later-imposed state sentence have not held that the court's order is binding on the state court. While such an order, if authorized, may be binding (to the extent possible) on the Bureau of Prisons (BOP),[3] at least one of those courts has expressly stated that the federal order does not limit the state court's sentencing options, *Andrews*, 330 F.3d at 1307 n.1; and another has observed that it "did not hold that the state court was so legally bound by the federal court's order that the state court could not order its sentence to run concurrently

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(2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant. Unlike the sentencing scheme at issue in *Ice*, Section 3584 does not require that a court find an additional fact, not found by a jury or admitted by the defendant, before imposing consecutive sentences. See 18 U.S.C. 3584. Nor does petitioner contend that the district court's order in this case violated *Apprendi* and *Blakely*.

[3] Accordingly, petitioner errs (Pet. 22-23) in asserting that, if an order under Section 3584 does not bind the state court, it is necessarily impermissible as outside the scope of "legitimate judicial power." It is one thing to say that a federal sentencing order binds federal actors implementing the sentence. It is quite another to say that it binds a state system that implements the will of a separate sovereign. Cf. Pet. 13; *United States* v. *Gonzales*, 520 U.S. 1, 11 (1997) (in a case involving consecutive sentences under 18 U.S.C. 924(c)(1), which then provided that no term of imprisonment imposed under that section "shall * * * run concurrently with any other term of imprisonment," reserving the question "whether a later sentencing state court is bound to order its sentence to run consecutively to the § 924(c) term of imprisonment").

with the federal sentence if it chose to do so," *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008) (discussing *Brown*, *supra*). The Tenth Circuit has said that a state court cannot override a federal court's determination, but on the facts of the case, the State effectively did so by releasing the defendant to federal custody with the statement that he had satisfied his state sentence. *Williams*, 46 F.3d at 58. The Eighth Circuit has said that "the federal sentence controls" in the event of a conflict, without addressing the practical implementation of that statement, *Mayotte*, 249 F.3d at 799, but has also said that "[o]nly the BOP has the authority to determine when a federal sentence commences" when a prisoner is in primary state custody and returned to the state courts for disposition of state charges, such that the federal sentencing court's authority consists of making a "recommendation" concerning whether a "federal sentence run[s] concurrent with the yet-to-be-imposed state sentence[]." *United States* v. *Hayes*, 2008 WL 2917652, at *2-*3 (8th Cir. July 31, 2008).

The Seventh Circuit—which *agrees* with petitioner's view that Section 3584(a) does not authorize a district court to require its sentence to be served consecutively to an anticipated state sentence, but which also believes that the last sentence of Section 3584(a) "automatically" and by "force of law" makes such sentences consecutive —holds that, despite that effect of Section 3584(a), "[t]he *next* judge in line may make service concurrent in practical effect" and that "the effective decision" on whether to make the sentences concurrent or consecutive therefore "then is made by the Attorney General (or the state judge)." *Romandine*, 206 F.3d at 738. For that reason, the *Romandine* court expressed the view

that the correct "answer" to the circuit split "does not matter, and the conflict is illusory." *Ibid.*

Petitioner's effort to identify a concrete practical effect from the conflict is unpersuasive. Petitioner contends (Pet. 20) that, despite the fact that a district court's order that its sentence be served consecutively to an anticipated state sentence has not been held binding, state courts may feel constrained to give effect to the federal court's position when the state court otherwise would have imposed a concurrent sentence. Petitioner offers no support for that proposition, and at least one court of appeals has encouraged the opposite view. See *Andrews*, 330 F.3d at 1307 n.1 ("The fact that the federal district court elected to sentence [the defendant] to a consecutive federal sentence by no means limits the sentencing options available to the state court."). And, in any event, in deciding an appropriate sentence, a state court may properly take into account the federal court's intent that the defendant serve cumulative sentences for his separate offenses. *Id.* at 1308 n.1 (state judge is "free * * * to recognize [that] the intent of the federal sentence is for the defendant to serve separate time for both his state and federal charges").

As a practical matter, moreover, under current decisions of the courts of appeals, a state court that subsequently sentences a defendant controls whether its sentence will run concurrently with or consecutively to a previously imposed federal sentence. When a defendant is in primary federal custody, a state court can make its sentence effectively concurrent to federal sentences by designating the defendant's federal institution for service of the state sentence. When a defendant is in primary state custody, a state court can make the state sentence effectively concurrent to a federal sentence by

adjusting the length of the state sentence to take into account the defendant's federal sentence, or by suspending a portion of the state sentence.

Petitioner contends (Pet. 21) that those approaches "imperil[] a state's ability to achieve its sentencing objectives, particularly when a defendant is in state custody." But the sentencing rule that petitioner advocates (*i.e.*, barring a federal court from ordering the federal sentence to run consecutively to a later-imposed state sentence) would not entirely solve the problems that he identifies. Even if a district court's order is silent on whether a federal sentence is to run concurrently with or consecutively to an as-yet-unimposed state sentence, a state court that sentences a defendant who is in primary state custody cannot guarantee that its sentence will be concurrent unless it reduces the length of its sentence to take account of the federal sentence. That is so because whether a defendant receives credit against his federal sentence for time spent in state detention before the commencement of his federal sentence is a question that will be determined by the federal BOP, not by the state court. See *United States* v. *Wilson*, 503 U.S. 329 (1992) (holding that BOP, not the federal sentencing court, has the authority to determine how much credit a defendant should receive for time spent in official detention before the commencement of his federal sentence). Federal authorities are neither required to grant a defendant credit for a state sentence nor required to allow a state prisoner to serve his state sentence in federal prison. See *Jake* v. *Herschberger*, 173 F.3d 1059, 1066 (7th Cir. 1999) ("[t]he state court's designation of [a defendant's] state sentence as concurrent with his prior federal sentence create[s] no obligation on the Attorney General to provide him with credit for time served in the

state prison," and a state right to be tendered to federal authorities to serve a concurrent state sentence in federal prison "creates no obligation for the federal authorities to accept the prisoner so tendered"). The views of the federal sentencing court will play a key role in that determination.[4]

Finally, petitioner argues (Pet. 20-21) that requiring state courts to engage in various maneuvers to effectuate their sentencing intentions "promotes a spirit of unseemly gamesmanship." Pet. 21. But so long as courts regard each sovereign as entitled to decide whether its punishment should be cumulative of the other's, the later-sentencing sovereign often has an advantage in effectuating its goal.

2. In any event, review is not warranted in this case because any decision on the merits is unlikely to have

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[4] A state court, a state prison system, or a defendant in state custody can ask BOP to designate a state prison for concurrent service of a federal sentence. Under those circumstances, BOP will consider, among other factors, the views of the federal sentencing court, and it will seek the sentencing court's recommendation when the court's intention is not obvious from its sentencing order. See 18 U.S.C. 3621(b)(4); Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05, Designation of State Institution for Service of Federal Sentence* 4-7 (2003). A sentencing order that is already clear on its face obviates the need for the sentencing court to revisit the question whether a consecutive or concurrent sentence is appropriate. See *id.* at 6 ("In making the determination, if a designation for concurrent service may be appropriate (e.g., the federal sentence is imposed first and there is no order or recommendation regarding the service of the sentence in relationship to the yet to be imposed state term), the [Regional Inmate Systems Administrator] will send a letter to the sentencing court * * * inquiring whether the court has any objections."). Whether or not embodied in a judgment, the view of the federal court that a concurrent designation is not appropriate is highly significant in BOP's determination. *Id.* at 6-7.

any effect on petitioner. Petitioner has not yet been formally charged, let alone convicted and sentenced, on the pending state misdemeanor charge. As of the date of this filing, the State has not filed a detainer against petitioner. In light of petitioner's anticipated release date of October 22, 2008, petitioner's federal term of imprisonment will likely expire before the resolution of the state misdemeanor case. At bottom, petitioner cannot claim harm from the court's order that his federal sentence be served consecutively to the North Carolina charge if he is released before the State sentences him. By the same token, even if this Court were to adopt the rule he advocates with respect to the construction of 18 U.S.C. 3584(a), vacate the judgment of the court of appeals, and remand the case for resentencing, relief would be unavailing because petitioner would have completed serving his federal sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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